

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
WVTV Licensee, Inc.)	Facility I.D. No. 74174
Licensee of Station WVTV(TV))	NAL/Acct. No. 0741420029
Milwaukee, Wisconsin)	FRN: 0002209260

**NOTICE OF APPARENT
LIABILITY FOR FORFEITURE**

Adopted: May 3, 2007

Released: May 7, 2007

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("NAL") issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's Rules (the "Rules"),¹ by the Chief, Video Division, Media Bureau pursuant to authority delegated under Section 0.283 of the Rules,² we find that WVTV Licensee, Inc. (the "Licensee"), licensee of Station WVTV(TV), Milwaukee, Wisconsin (the "Station"), apparently willfully and repeatedly violated Section 73.670 of the Rules, by failing to comply with the limits on commercial matter in children's programming.³ Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of twelve thousand dollars (\$12,000).

II. BACKGROUND

2. In the Children's Television Act of 1990, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewal applications the extent to which the licensee has complied with such commercial limits.⁴ Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial").⁵

3. On August 1, 2005, the Licensee filed its license renewal application (FCC Form 303-S)

¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

² See 47 C.F.R. § 0.283.

³ See 47 C.F.R. § 73.670.

⁴ Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394.

⁵ *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

for Station WVTM(TV) (the “Application”) (File No. BRCT-20050801BDQ). In response to Section IV, Question 5 of the Application, the Licensee stated that, during the previous license term, it failed to comply with the limitations on commercial matter in children’s programming specified in Section 73.670 of the Commission’s Rules. In Exhibit 19 and in a March 1, 2007 amendment to the Application, the Licensee indicated that the Station violated the children’s television commercial limits and policies on four occasions between September 24, 2002, and December 23, 2006. Of those four overages, one was 90-seconds in duration and three were program-length commercials. The Licensee stated that the 90-second overage was caused by human error on the part of an employee of GDMX, an entity that provides the WB Network with program format, content integration, and satellite uplink services.

4. Second, the Licensee reported that on September 24, 2002, the Station aired a commercial for the Gameboy Advance E-Reader during the “Pokemon” program. According to the Licensee’s description, three “Pokemon” game cards were shown for approximately 1.04 seconds. The Licensee also indicated that the “Pokemon” game cards were partially hidden and only the letters “MON” were identifiable. The Licensee stated that the “Pokemon” characters were not identifiable and were not verbally identified during the commercial. The Licensee maintained that the *de minimis* appearance of these cards could not have confused the viewer and that this occurrence does not violate the children’s programming commercial limits rules.

5. Third, the Licensee stated that on July 19, 2004, the Station aired a commercial for Cinnamon Toast Crunch during the “Sabrina” program. According to the Licensee’s description, the image of several DVDs that were being given away in boxes of Cinnamon Toast Crunch appeared at the end of the commercial. The Licensee indicated that the image of one of these DVDs included the “Sabrina” character and that it was visible for less than two seconds. The Licensee maintained that the appearance of this character “without any verbal reference to the character or the show” could not have confused the viewer and that this incident does not violate the children’s programming commercial limits rules.

6. The remaining incident the Licensee reported occurred on December 23, 2006, when the Station aired a CW Network commercial for Post Cereal’s Cocoa Pebbles during the “Xiaolin Showdown” program. According to the Licensee, images from Post Cereal’s postopia.com website appeared, including images of the website’s navigation bar. The Licensee stated that the navigation bar included a “very brief” appearance of characters from the “Xiaolin Showdown” program. The Licensee maintained that these characters were visible for a short period of time, “comprised only a tenth of the screen height, and did not speak during the commercial spot.” The Licensee argued that this occurrence does not violate the children’s television commercial limits rule because the appearance of the characters could not have confused the viewer and the commercial did not involve a program-related product for purchase. The Licensee opined that at most, this incident may have violated the Commission’s host-selling policy. Moreover, the Licensee asserted that it should not be sanctioned for this incident because the Station was “not involved in the selection, planning, or approval of the network commercials aired” during the “Xiaolin Showdown” program.⁶

III. DISCUSSION

7. On four occasions, Station WVTM(TV)’s broadcast of material that exceeded the children’s television commercial limits constitutes an apparent willful and repeated violation of Section 73.670. The Licensee contended that the “Pokemon” game cards appeared for approximately 1.04 seconds during the commercial for the Gameboy Advance E-Reader, and that the Sabrina character was visible for less than two seconds during the commercial for Cinnamon Toast Crunch. The Licensee also

⁶ In support of its argument, the Licensee cited, *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, 19 FCC Rcd 19230 (2004).

stated that characters from the “Xiaolin Showdown” program appeared briefly during the Cocoa Pebbles commercial. However, it is well-established that the determination as to whether a particular program is a program-length commercial is not dependent on the duration of the appearance of the program-related product in the commercial announcement. The Commission has stated on numerous occasions that, where a commercial announcement includes a product related to the program in which the commercial is broadcast, then the program is a program-length commercial regardless of the duration of the appearance of the program-related product in the commercial.⁷ Moreover, we believe that, in the context of the cognitive abilities of young children, there is the potential for confusion between the Gameboy commercial and the “Pokemon” program regardless of whether any “Pokemon” character is depicted given the image of a “Pokemon” game card contained in the commercial and the consequent likelihood that children may associate it with the program. Further, we believe that, in the context of the cognitive abilities of young children, there is the potential for confusion between the Cinnamon Toast Crunch commercial and the “Sabrina” program regardless of whether there was any verbal mention of the character or the show given the appearance of the Sabrina character in the commercial and the consequent likelihood that children may associate it with the program. Similarly, we think that there is the potential for confusion between the Cocoa Pebbles commercial and the “Xiaolin Showdown” program since the commercial includes images of characters from the “Xiaolin Showdown” program.

8. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.⁸ Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.⁹ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁰ and the Commission has so interpreted the term in the Section 503(b) context.¹¹ Section 312(f)(2) of the Act provides that “[t]he term ‘repeated,’ when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”¹²

9. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs.¹³ Given this congressional concern, the Commission made it clear that program-length commercials, by their very nature, are extremely serious violations of the children’s television commercial limits, stating that the program-length commercial policy “directly addresses a fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter, not be all the more confused by a show that interweaves program content and commercial matter.”¹⁴

⁷ *UTV of San Francisco, Inc. (KBHK-TV)*, 10 FCC Rcd 10986, 10988 (1995); *see also WPIX, Inc.*, 14 FCC Rcd 9077 (MMB 1999) (commercial for “Spirit of Mickey” home video showing brief image of Donald Duck on cover of video aired during “Quack Pack” program); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (1995), *aff’d*, 13 FCC Rcd 10099 (MMB 1997) (commercial for a fast food restaurant promoting a trip to Disney World as a contest prize contained a brief image of Goofy and aired during the program “Goof Troop”).

⁸ 47 U.S.C. § 503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(1).

⁹ 47 U.S.C. § 312(f)(1).

¹⁰ *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹¹ *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹² 47 U.S.C. § 312(f)(2).

¹³ S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989).

¹⁴ *Children’s Television Programming*, 6 FCC Rcd at 2118.

10. To the extent the Licensee has argued that the 90-second overage and the program-length commercials resulted from the insertion of commercial matter in programming supplied by a program distributor or were inserted into the program by the Station's television network, this contention does not relieve it of responsibility for the violations. In this regard, the Commission has consistently held that a licensee's reliance on a program's source or producer for compliance with the Commission's children's television rules and policies will not excuse or mitigate violations which do occur.¹⁵

11. The Commission's *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$8,000 for violation of Section 73.670.¹⁶ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁷

12. In this case, the Licensee failed to comply with the limits on commercial matter in children's programming on four occasions, including three program-length commercials. Accordingly, we find that the Licensee is apparently liable for a forfeiture in the amount of \$12,000 for its apparent willful and repeated violation of Section 73.670.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that WVTV Licensee, Inc. is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of twelve thousand dollars (\$12,000) for its apparent willful and repeated violation of Section 73.670 of the Commission's Rules.

14. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, WVTV Licensee, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

15. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL/Acct. No.* and *FRN No.* referenced above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6229.

16. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Barbara A. Kreisman, Chief, Video Division, Media Bureau, and MUST INCLUDE the *NAL/Acct. No.* referenced above.

¹⁵ See, e.g., *Max Television of Syracuse, L.P. (WSYT(TV))*, 10 FCC Rcd 8905 (MMB 1995); *Mt. Mansfield Television, Inc. (WCAX-TV)*, 10 FCC Rcd 8797 (MMB 1995); *Boston Celtics Broadcasting Limited Partnership (WFXT(TV))*, 10 FCC Rcd 6686 (MMB 1995).

¹⁶ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

¹⁷ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(4); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section II.

17. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

18. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁸

19. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to WVTV Licensee, Inc., c/o Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, N.W., Washington, D.C. 20037-1128, and to its counsel, Kathryn R. Schmeltzer, Esquire, Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, N.W., Washington, D.C. 20037-1128.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁸ See 47 C.F.R. § 1.1914.